No. 18-966

IN THE

Supreme Court of the United States

DEPARTMENT OF COMMERCE, ET AL.,

Petitioners,

v.

NEW YORK, ET AL.,

Respondents.

On Writ of Certiorari Before Judgment to the United States Court of Appeals for the Second Circuit

BRIEF OF CURRENT MEMBERS OF CONGRESS AND BIPARTISAN FORMER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are current members of Congress and bipartisan former members of Congress who have a strong interest in ensuring that the Census Bureau respects its constitutional duty to count all persons living in the United States, citizen and noncitizen alike. As current and former members of Congress, *amici* know that Census data is used to make critically important decisions, including regarding how representatives are apportioned in Congress; how Electoral College votes are distributed amongst the states; how state, local, and congressional districts are drawn; and how billions of dollars of federal funds to local communities are allocated. Thus, *amici* also appreciate that failing to count all persons in the United States—as our Constitution requires—would be enormously damaging, and the consequences of an unfair, inaccurate count would endure for at least the next ten years, and possibly much longer. *Amici* thus have a strong interest in this case.

A full listing of *amici* appears in the Appendix.

SUMMARY OF ARGUMENT

On March 16, 2018, Commerce Secretary Wilbur Ross issued a memorandum directing the Census Bureau to add a question to the 2020 Census asking all persons residing in the United States to divulge their

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

citizenship status. To justify this order, Secretary Ross blatantly manipulated the administrative process. To start, he manufactured a Department of Justice request to add the citizenship question—a fact he deliberately hid from members of Congress. Then, set on adding a citizenship question regardless of what the administrative record showed about the need for such a question, Secretary Ross turned a blind eye to reams of evidence that demonstrated that the addition of this new question was unnecessary and would undermine the accuracy of the Census. Secretary Ross's actions flouted both the government's constitutional obligation under the Census Clause to ensure a count of all persons and the laws Congress passed to safeguard the integrity of this constitutionally mandated count.

The Census is the cornerstone of our democracy. To ensure equal representation for all, the Constitution, through both Article I, Section 2 and the Fourteenth Amendment, explicitly requires the federal government to accurately conduct an "actual Enumeration" of the people. U.S. Const. art. I, § 2, cl. 3. This language places a clear duty on the federal government to count the "whole number of persons in each State," *id.* amend. XIV, § 2. In other words, the federal government must count *all* people living in the United States, whether they are citizens or noncitizens, whether they were born in the United States or in a distant part of the world.

This constitutional imperative that there be an "actual Enumeration," *id.* art. I, § 2, cl. 3, of the people reflects the Framers' conclusion—first at the nation's Framing more than two centuries ago and then again in the aftermath of our nation's bloody civil war—that total population is the "natural & precise measure of Representation," 1 *The Records of the Federal Convention of 1787*, at 605 (Max Farrand ed., 1911)

[hereinafter *Records of the Federal Convention*], and "the only true, practical, and safe republican principle," Cong. Globe, 39th Cong., 1st Sess. 2767 (1866); *id.* ("Numbers, not voters; numbers, not property; this is the theory of the Constitution."). "As the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents . . . ." *Evenwel v. Abbot*, 136 S. Ct. 1120, 1132 (2016). Thus, the Constitution draws no distinction between citizens and noncitizens, but rather requires that the "whole immigrant population should be numbered with the people and counted as part of them." Cong. Globe, 39th Cong., 1st Sess. 432. It imposes a constitutional duty on the federal government to conduct a complete and accurate count of everyone in order to realize the "Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives." *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

The Constitution's mandate that the federal government count the population of the entire nation to ensure equal representation for all persons creates a "strong constitutional interest in accuracy." *Utah v. Evans*, 536 U.S. 452, 478 (2002). The Framers knew that "those who have power in their hands will . . . always when they can . . . increase it," 1 *Records of the Federal Convention* at 578. They thus enshrined the requirement that all persons be counted directly into the Constitution to "shut[] the door to partiality or oppression," *The Federalist No. 36*, at 188 (Alexander Hamilton) (Clinton Rossiter rev. ed., 1999), and prevent the government from using "a mode" of taking the census "as will defeat the object[] and perpetuate the inequality," 1 *Records of the Federal Convention* at 571. In short, the Framers "placed a high[] value on preventing political manipulation," *Evans*, 536 U.S. at

506 (Thomas, J., concurring in part and dissenting in part), and the federal government may not manipulate the Census in order to evade the Constitution's requirement that all persons be counted.

While the Framers mandated in the Constitution itself that there be an "actual Enumeration" of the people, U.S. Const. art. I, § 2, cl. 3, they "did not write detailed census methodology into the Constitution," *Evans*, 536 U.S. at 479 (majority opinion). Instead, they left it to Congress to prescribe the "Manner" of taking the Census. U.S. Const., art. I, § 2, cl. 3. Using this express constitutional power, Congress has prohibited the Commerce Secretary from adding new questions to the Census when the information those questions would produce could be obtained from administrative records. By prohibiting unnecessary Census questions, Congress sought to reduce the burden on Census respondents and to ensure that the constitutionally required count of all persons remains predominant.

Specifically, Section 6 of the Census Act provides, in relevant part, that "[t]o the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required, the Secretary shall acquire and use information available" from administrative records "instead of conducting direct inquiries." 13 U.S.C. § 6(c). As the statute's plain language reflects, the Secretary must "acquire and use" administrative records to satisfy its information-gathering needs "[t]o the maximum extent possible" rather than "conducting direct inquiries," *id.*, which could deter participation and detract from the count of all persons—the "actual Enumeration" the Constitution expressly mandates, U.S. Const. art. I, § 2, cl. 3. This is an explicit, clear-cut command prohibiting the

addition of new questions to the Census where the relevant information may be gathered using existing records.

Secretary Ross's decision to add the citizenship question cannot be squared with this requirement, and tellingly Secretary Ross never even addressed this provision in his memorandum ordering the addition of the citizenship question. When Secretary Ross first formally proposed asking all persons to report their citizenship status, the Census Bureau objected that a mandatory citizenship question would "harm[] the quality of the census count, and would use substantially less accurate citizenship data than are available from administrative sources." *See* App. Cert. 47a; *see id.* at 9a ("[H]undreds of thousands—if not millions—of people will go uncounted in the census if the citizenship question is included."). Secretary Ross demanded the addition of the citizenship question anyway, ignoring Congress's directive to "acquire and use" administrative records and avoid "direct inquiries" "[t]o the maximum extent possible." 13 U.S.C. § 6(c). This violation of an explicit limitation contained in the Census Act requires that Secretary Ross's order be set aside.[2]

Secretary Ross's proffered justification for the citizenship question—to better enforce the Voting Rights Act—cannot justify the Secretary's blatant violation of Section 6(c). First of all, the Secretary has no expertise with respect to the Voting Rights Act and no

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[2] In addition to the Section 6(c) violation, the district court held that the addition of the citizenship question violated the Administrative Procedure Act in "multiple independent ways," including that the decision was arbitrary and capricious, violated procedural requirements, and concealed the true basis for the decision. App. Cert. 9a-10a. This brief does not address those independent bases for affirmance.

authority to enforce it. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629 (2018). Second, citizenship data could have been obtained from administrative records in a manner entirely consistent with the Census Act. Third, a citizenship question has never been viewed as necessary to ensure robust protection of the right to vote free from racial discrimination. Indeed, since the passage of the Voting Rights Act in 1965, the Census has never asked all persons to report their citizenship status. In sum, the Secretary offers nothing more than a specious explanation for his decision, and this explanation cannot justify undercutting what the Constitution mandates: a count of *all* the people, regardless of their citizenship status.

ARGUMENT

I. The Text and History of the Census Clause Require the Federal Government To Count All Persons To Ensure Equal Representation for All Persons.

In order to ensure that "the foundations of this government should be laid on the broad basis of the people," 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 21 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter *Elliot's Debates*], Article I, Section 2 provides that "Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons . . . three fifths of all other Persons." U.S. Const. art. I, § 2, cl.3. To ensure a proper count of the nation's total population, Article I, Section 2 requires that an "actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States,

and within every subsequent Term of ten Years, in such Manner as they shall by Law direct." *Id.*

In choosing the total-population standard, the Framers decreed that "as all authority was derived from the people, equal numbers of people ought to have an equal no. of representatives." 1 *Records of the Federal Convention* at 179. Determining representation in Congress based on a count of all persons reflected that "every individual of the community at large has an equal right to the protection of government." *Id.* at 473; *id.* at 477 ("[T]he people shd. be repre[se]nted in proportion to [their] numbers, the people then will be free . . . ."); *Evenwel*, 136 S. Ct. at 1129 (explaining that "the principle of representational equality figured prominently in the decision to count people, whether or not they qualify as voters").

The idea that all persons should enjoy equal representation had deep roots in America's bid for independence from England. The Framers were familiar with what James Madison called the "vicious representation in G. B.," 1 *Records of the Federal Convention* at 464, in which "so many members were elected by a handful of easily managed voters in 'pocket' and 'rotten' boroughs, while populous towns went grossly underrepresented or not represented at all," Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 210 (1996). The Declaration of Independence charged that King George III had forced the colonists to "relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only." The Declaration of Independence para. 5 (U.S. 1776). Having seen the political system manipulated for partisan ends in England, the Framers strove to design a system that would reflect the principle that a "free and equal representation is the best, if not the only foundation upon which

a free government can be built." 2 *Elliot's Debates* at 25 (emphasis omitted). Of all "the electoral safeguards for the representational system," none "was as important to Americans as equality of representation." Gordon S. Wood, *The Creation of the American Republic, 1776–1787*, at 170 (1998 ed.).

To achieve these goals, the Framers imposed on the federal government a duty to conduct a complete and accurate count of all people residing in the nation, creating a structural protection for equal representation. This was a revolutionary undertaking. "While other nations had attempted population counts, none had made the count itself an important method of maintaining democracy by mandating it through a founding document." *Evans*, 536 U.S. at 510 (Thomas, J., concurring in part and dissenting in part); Margo Anderson, *The Census and the Federal Statistical System: Historical Perspectives*, 631 Annals of Am. Acad. of Pol. & Soc. Sci. 152, 154 (2010) ("With th[e Census Clause's] words, the United States became the first nation in the history of the world to take a population census and use it to allocate seats in a national assembly according to population."). Thus, at a time when "democratic self-government existed almost nowhere on earth," Akhil Reed Amar, *America's Constitution: A Biography* 8 (2005), the Framers made the Census the cornerstone of the democratic system of government they created.

The text of Article I, Section 2 provided a "conjectural ratio" for the apportionment of representatives "to prevail in the outset," but the Framers refused to permit guesswork to be used going forward. 1 *Records of the Federal Convention* at 578; *Evans*, 536 U.S. at 475 ("[T]he original allocation of seats in the House was based on a kind of 'conjectur[e],' in contrast to the deliberately taken count that was ordered for the

future." (quoting 1 *Records of the Federal Convention* at 578-79)). As George Mason argued, "a Revision from time to time according to some permanent & precise standard" was "essential to [the] fair representation required in the 1st. branch." 1 *Records of the Federal Convention* at 578. While the Framers did not prescribe a "detailed census methodology," *Evans*, 536 U.S. at 479, they established a firm rule that the political branches cannot vary: all persons must be counted, regardless of where they are from.

Wary that those in power might try to undermine the promise of equal representation for all, the Framers insisted on an "actual Enumeration"—a national count of all inhabitants—once every ten years. U.S. Const. art. I, § 2, cl. 3. As Founding-era dictionaries make clear, "an 'enumeration' requires an actual counting." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 346 (1999) (Scalia, J., concurring in part) (collecting dictionary definitions); *Evans*, 536 U.S. at 475 ("Late-18th-century dictionaries define the word simply as an 'act of numbering or counting over . . . .'" (quoting 1 Samuel Johnson, *A Dictionary of the English Language* 658 (4th rev. ed. 1773))). As James Madison observed during debates over the First Census Act, while "there will be more difficulty attendant on taking the census, in the way required by the [C]onstitution," a count of all persons would provide "the exact number" rather than "assertions and conjectures." James Madison, *Census* (Feb. 2, 1790), *in* 13 *The Papers of James Madison* (J.C.A. Stagg ed., digital ed. 2010). The constitutional requirement of an "actual Enumeration," U.S. Const. art. I, § 2, cl. 3, would help ensure that "every individual of the community at large has an equal right to the protection of government," 1 *Records of the Federal Convention* at

473, and prevent political manipulation of our democratic system of government.

As the debates over the Census Clause at the Constitutional Convention reflect, the Framers understood that "those who have power in their hands will not give it up while they can retain it. On the [c]ontrary we know they will always when they can rather increase it." *Id.* at 578; *Evans*, 536 U.S. at 500 (Thomas, J., concurring in part and dissenting in part) (observing that "[d]ebate about apportionment and the census . . . focused for the most part on creating a standard that would limit political chicanery"). The Framers' decision to mandate a national count of all inhabitants every ten years to ensure equal representation for all persons "had the recommendation of great simplicity and uniformity in its operation, of being generally acceptable to the people, and of being less liable to fraud and evasion, than any other, which could be devised." 2 Joseph Story, *Commentaries on the Constitution* § 633, at 107 (1833). As Alexander Hamilton emphasized, "[a]n actual census or enumeration of the people must furnish the rule, a circumstance which effectively shuts the door to partiality or oppression." *The Federalist No. 36*, *supra*, at 188 (Alexander Hamilton).

In short, both supporters and opponents recognized that a fixed constitutional standard would limit opportunities for manipulation of our representative democracy. Gouverneur Morris opposed the Census Clause as "fettering the Lægislature too much," but he recognized that if the mode for taking the Census was "unfixt the Lægislature may use such a mode as will defeat the object[] and perpetuate the inequality." 1 *Records of the Federal Convention* at 571. In response, Edmund Randolph pointed out that "[i]f the danger suggested by Mr. Govr. Morris be real, of advantage being

taken of the Legislature in pressing moments, it was an additional reason, for tying their hands in such a manner that they could not sacrifice their trust to momentary considerations." *Id.* at 580. This argument carried the day, and the Framers concluded that "the *periods* & the *rule* of revising the Representation ought to be fixt by the Constitution." *Id.* at 582.

The Constitution's rule that representatives would be apportioned based on an "actual Enumeration" of the people, U.S. Const. art. I, § 2, cl. 3, however, was undercut by the Three-Fifths Clause, which provided that, for the purpose of determining representation in Congress, enslaved persons would be counted as three-fifths of a person. "The more slaves the Deep South could import from the African continent—innocents born in freedom and kidnapped across an ocean to be sold on auction blocks—the more seats it would earn in the American Congress." Amar, *supra*, at 90. During the debates in the Convention, Gouverneur Morris and others argued strenuously against the adoption of the Three-Fifths Clause, pointedly asking "[u]pon what principle is it that the slaves shall be computed in the representation? Are they men? Then make them Citizens & let them vote? Are they property? Why then is no other property included?" 2 *Records of the Federal Convention* at 222. The upshot of the Clause was that "the inhabitant of Georgia and S. C. who goes to the coast of Africa, and . . . tears away his fellow creatures from their dearest connections & dam(n)s them to the most cruel bondages, shall have more votes in a Govt. instituted for protection of the rights of mankind." *Id.*

Despite these arguments, the Convention approved the Three-Fifths Clause, which it deemed a compromise necessary to ensure the Constitution's ratification. Nearly 80 years later, following a bloody civil war

fought over our nation's original sin of slavery, the Framers of the Fourteenth Amendment would revisit the Constitution's system of representation in the wake of emancipation and abolition, as the next Section discusses.

II. The Fourteenth Amendment Reaffirmed the Constitutional Obligation To Count All Persons, Citizen and Non-Citizen Alike.

With the adoption of Section 2 of the Fourteenth Amendment, which provides that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed," U.S. Const. amend XIV, § 2, the Founding generation's commitment to equal representation for all as determined by a national count of all persons was finally realized. Yet it took seven months of heated debate for this guarantee of equal representation for all persons to emerge. During the debates over the Fourteenth Amendment, many in Congress sought a drastic change in our constitutional principle of equal representation, arguing that only citizens or voters should be counted in determining representation. The Framers of the Fourteenth Amendment decisively rejected those arguments and reaffirmed total population as the Constitution's basis for representation. *Evenwel*, 136 S. Ct. at 1128. As Jacob Howard explained in introducing the Fourteenth Amendment, "numbers," that is, total population, is "the most just and satisfactory basis, and this is the principle upon which the Constitution itself was originally framed, that the basis of representation should depend upon numbers; and such . . . is the safest and most secure principle upon which the Government can rest. Numbers, not voters; numbers, not property; this is the theory of the

Constitution." Cong. Globe, 39th Cong., 1st Sess. 2767.

When the Thirty-Ninth Congress met in December 1865, questions of representation were front and center. With the Three-Fifths Clause a nullity and the full personhood of formerly enslaved African Americans recognized for the purpose of representation, the Framers of the Fourteenth Amendment were concerned that the Southern states would gain an ill-gotten windfall: far more representation in Congress and in the Electoral College than they had before they seceded from the Union. *See, e.g., id.* at 357 ("Shall the death of slavery add two fifths to the entire power which slavery had when slavery was living?"). As the Joint Committee on Reconstruction, which was tasked with drafting the Fourteenth Amendment, explained, "[t]he increase of representation necessarily resulting from the abolition of slavery was considered the most important element in the questions arising out of the changed condition of affairs, and the necessity for some fundamental action in this regard seemed imperative." *Report of the Joint Committee on Reconstruction, at the First Session Thirty-Ninth Congress* xiii (1866).

During debates over the Fourteenth Amendment, many urged a fundamental change in constitutional principles of equal representation, insisting that "representation shall be based on citizens of the United States who may be male adult voters" so that "every voter should be equal in political power all over the Union." Cong. Globe, 39th Cong., 1st Sess. 404. Some even called for overhauling the Census Clause and putting in its place a "true census of the legal voters." *Id.* at 10 (1865). But as this Court has recognized, "[v]oter-based apportionment proponents encountered fierce resistance . . . . Much of the opposition was

grounded in the principle of representational equality." *Evenwel*, 136 S. Ct. at 1128. Supporters of the Fourteenth Amendment argued that such a change in our Constitution's system of representation would be "an abandonment of one of the oldest and safest landmarks of the Constitution" and would "introduce[] a new principle in our Government, whose evil tendancy and results no man can measure to-day." Cong. Globe, 39th Cong., 1st Sess. 377. Instead, the Reconstruction Framers insisted on "leav[ing] the primary basis of representation where it was placed by our fathers, the whole body of the people." *Id.* at 385.

Particularly relevant here, Representative John Bingham argued that it would be unwise to "strike from the basis of representation the entire immigrant population not naturalized," observing that "[u]nder the Constitution as it now is and as it always has been, the entire immigrant population of this country is included in the basis of representation." *Id.* at 432. In his view, the "whole immigrant population should be numbered with the people and counted as part of them." *Id.*; *id.* at 411 (arguing that representation based on number of voters "takes from the basis of representation all unnaturalized foreigners"). Others made similar arguments, insisting that representation should be based "on the largest basis of population, counting every man, woman, and child," *id.* at 1280, and that "the whole population is represented; that although all do not vote, yet all are heard. That is the idea of the Constitution," *id.* at 705. The Fourteenth Amendment's proponents refused to "throw[] out of the basis at least two and a half millions of unnaturalized foreign-born men and women," insisting that "[a] community may be represented, every man in the community may be represented, and every woman and child in the community may be represented, and yet not

every man twenty-one years of age be a voter." *Id.* at 1256, 1279-80. "All the people, or all the members of a State or community, are equally entitled to protection; they are all subject to its laws; they must all share its burdens, and they are all interested in its legislation and government." *Id.* at 2962.

These proponents of equal representation ultimately carried the day, and Congress adopted the Fourteenth Amendment, insisting that total population, not citizen or voter population, was the basis for our Constitution's system of representation. The Fourteenth Amendment, which was approved by the people and became a part of the Constitution in 1868, reaffirmed that our Constitution's system of equal representation for all depends on a count of the nation's entire population, including noncitizens. As this history shows, the purpose of the Census has never been to count just citizens, but rather to count "the whole body of the people." *Id.* at 385.

III. The Census Act Prohibits the Addition of New Census Questions Where the Relevant Information May Be Gathered Using Existing Records.

As this history shows, the Constitution mandates a count of all persons, citizen and noncitizen alike, for the purpose of apportioning the House of Representatives in a manner that ensures equal representation for all. Reflecting the importance of the constitutionally mandated count of all persons, Congress has used its express power to regulate the "Manner" of the Census to limit the authority of the Secretary of Commerce to add new questions to the Census. U.S. Const., art. I, § 2, cl. 3.

Congress has done this, in part, through Section 6 of the Census Act, which contains three separate

provisions. First, Section 6(a) addresses the authority of the Secretary of Commerce to obtain records held by other parts of the federal government, providing that "[t]he Secretary, whenever he considers it advisable, may call upon any other department, agency, or establishment of the Federal Government, or of the government of the District of Columbia, for information pertinent to the work provided for in this title." 13 U.S.C. § 6(a). Second, Section 6(b) addresses the Secretary's authority to obtain records held by state or local governments, authorizing "[t]he Secretary" to "acquire, by purchase or otherwise, from States, counties, cities, or other units of government, or their instrumentalities, or from private persons and agencies, such copies of records, reports, and other material as may be required for the efficient and economical conduct of the censuses and surveys provided for in this title." *Id.* § (6)(b). Third, and finally, Section 6(c) provides that "[t]o the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required, the Secretary shall acquire and use information available from any source referred to in subsection (a) or (b) of this section instead of conducting direct inquiries." *Id.* § 6(c).

As the plain language of Section 6(c) reflects, the Secretary "shall acquire and use" administrative records to satisfy its information-gathering needs "[t]o the maximum extent possible" rather than "conducting direct inquiries." *Id.* This language is phrased in mandatory terms, imposing a "nondiscretionary duty" on the Secretary of Commerce to use administrative records where feasible. *Murphy v. Smith*, 138 S. Ct. 784, 787 (2018). Congress imposed this limitation to "reduc[e] respondent burden," H.R. Conf. Rep. 94-1719, at 10 (1976), and to ensure that the Secretary of Commerce "conduct[s] a census that is accurate and that

fairly accounts for the crucial representational rights that depend on the census and the apportionment," *Franklin v. Massachusetts*, 505 U.S. 788, 820 (1992) (Stevens, J., concurring in part and concurring in the judgment). It therefore prevents the Secretary of Commerce from adding questions to the Census that might deter participation when the information could be obtained through existing records. And it prevents the Secretary from adding questions to the Census that might bias the count and thereby manipulate the constitutionally required count of all persons. As the text of the law reflects, Congress was concerned that adding new questions might impose too great a burden on respondents or limit their willingness to participate in the Census. The solution, Congress concluded, was to insist that the Secretary of Commerce use administrative records, to the maximum extent possible, to gather any additional information he or she might want.

This statutory command puts the thumb firmly on the scale against adding new questions to the Census when, considering the character of the "statistics required," existing records can be used to supply the information in question. 13 U.S.C. § 6(c). Indeed, even if the federal government does not itself possess the relevant information, the Census Act directs the Secretary to "acquire" those records rather than add new "direct inquiries" to the Census. *Id.* In sum, "[t]o the maximum extent possible," the Secretary must "acquire and use" pre-existing records rather than "conducting direct inquiries" which could deter participation and detract from the count of all persons—the sole question the Constitution expressly mandates. *Id.*

As the record reflects, in adding a citizenship question, Secretary Ross ignored Section 6(c) entirely. Secretary Ross never gave any explanation—much less a reasoned one—regarding how the addition of the

citizenship question could be squared with Congress's command to "acquire and use" administrative records "[t]o the maximum extent possible." *Id.* Indeed, Secretary Ross analyzed the question whether to add a direct inquiry asking all persons to divulge their citizenship status as if Section 6(c) simply did not exist. In effect, by this critical omission, Secretary Ross read a critical provision out of the Census Act—the very Act he was charged with enforcing. This, of course, transgressed long settled principles that demand that agencies act in accord with the rule of law. *See Utility Air Reg. Grp. v. EPA*, 573 U.S. 302, 328 (2014) ("[A]n agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate."); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) ("We will not alter the text in order to satisfy the policy preferences of the Commissioner."); *Peters v. Hobby*, 349 U.S. 331, 345 (1955) ("Agencies . . . must of course be free to give reasonable scope to the terms conferring their authority. But they are not free to ignore plain limitations on that authority."); *Caring Hearts Pers. Home Servs., Inc. v. Burwell*, 824 F.3d 968, 970 (10th Cir. 2016) (Gorsuch, J.) ("For surely one thing no agency can do is apply the wrong law to citizens who come before it, especially when the right law would appear to support the citizen and not the agency.").

The Department of Justice offers two arguments to justify Secretary Ross's flouting of Section 6(c). Both are meritless.

First, the Department insists that Section 6(c)'s requirement that the Secretary "shall acquire and use" administrative records "[t]o the maximum extent possible" rather than "conducting direct inquiries," 13 U.S.C. § 6(c), contains "no judicially manageable standards to evaluate compliance with its terms." Pet'rs Br. 45-46. This ignores the text enacted by

Congress, which imposes a legal duty on the Secretary of Commerce to use administrative records "[t]o the maximum extent" possible, 13 U.S.C. § 6(c), a phrase Congress often uses to constrain governmental action, *see* 16 U.S.C. § 1456(c)(1)(A) (Coastal Zone Management Act); 20 U.S.C. § 1412(5)(A) (Individuals with Disabilities Education Act); 42 U.S.C. § 2000cc-3(g) (Religious Land Use and Institutionalized Persons Act of 2000). Instead of giving effect to Section 6(c), the Department would simply have this Court read it out of the Census Act, in contravention of this Court's duty to "respect the role of the Legislature and take care not to undo what it has done," *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015).

Second, the Department argues that Secretary Ross's failure to explicitly consider the limitations contained in Section 6(c) is irrelevant because the provision's requirements have nonetheless been satisfied. *See* Pet'rs Br. 48. But "[t]his line of reasoning contradicts the foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). The Secretary's decision in this case "'must be measured by what [he] did, not by what [he] might have done.'" *Id.* at 2711 (quoting *Chenery*, 318 U.S. at 93-94). The Department of Justice can take no solace in the fact that Secretary Ross considered whether to rely on administrative records, because it is undisputed that the Secretary did not consider at all his legal duty to use those records "[t]o the maximum extent possible," 13 U.S.C. § 6(c). "Whatever potential reasons the Department might have given," the Secretary of Commerce gave "no reasons at all" to justify his conduct under the Census Act. *Encino Motorcars, LLC v.*

Navarro, 136 S. Ct. 2117, 2127 (2016). If federal agencies were permitted to engage in the kind of creative reconstruction of agency action that the Department offers here, it would render *Chenery* a nullity.

In sum, because Secretary Ross ran roughshod over Congress's clear directive to "acquire and use" administrative records "[t]o the maximum extent possible," 13 U.S.C. § 6(c), his order must be set aside.

IV. The Goal of Enforcing the Voting Rights Act Does Not Justify Ignoring the Requirements of the Constitution and the Census Act.

Rather than follow his constitutional obligation to ensure an "actual Enumeration" of the people, U.S. Const. art. I, § 2, cl. 3, and his duty under the Census Act to avoid "direct inquiries" to the "maximum extent possible," 13 U.S.C. § 6(c), the Secretary insisted that a citizenship question was necessary to better enforce the Voting Rights Act. This flimsy rationale—which was never mentioned at all until Secretary Ross engineered DOJ's request for a citizenship question—cannot survive even the most cursory review.

First, the Secretary has no expertise with respect to the Voting Rights Act and no authority to enforce it. *See Epic Sys. Corp.*, 138 S. Ct. at 1629. Thus, this Court must exercise its own judgment in determining whether the addition of this question is necessary. *See id.*; *see also id.* (the Secretary should not have "bootstrap[ped] [him]self into an area in which [he] has no jurisdiction" (quoting *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990))).

Second, since the passage of the Voting Rights Act in 1965, the Census has never asked all persons to report their citizenship status. Such data is not necessary to enforce the Voting Rights Act. John Gore, the primary author of the Department of Justice request

for the citizenship question, has admitted as much. App. Cert. 94a-95a (concession that "'CVAP data collected through the census questionnaire is not necessary for DOJ's VRA enforcement efforts'" (citation omitted)).

Indeed, for the last 53 years—until this Administration's eleventh-hour proposal to add a citizenship question to the 2020 Census—no one has ever suggested that enforcement of the Voting Rights Act was hampered by the failure of the Census Bureau to ask all persons residing in the United States to divulge their citizenship status. The members of Congress who wrote the Voting Rights Act and its amendments have never so much as suggested that the Census should ask all persons in the country to provide their citizenship status in order to ensure proper enforcement of the Act. Nor have the civil rights lawyers or Department of Justice lawyers who bring lawsuits to enforce the Voting Rights Act, or the state and local governmental entities that defend their electoral practices against Voting Rights Act challenges. *See, e.g.*, *Progress Rep. on the 2020 Census: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 115th Cong. 14 (May 8, 2018) (testimony of Professor Justin Levitt) ("Despite a deep commitment to enforcing the Voting Rights Act . . . we never requested that the decennial enumeration include a question relating to citizenship. Nor had the Civil Rights Division of any Justice Department, under any Administration, for the previous 53 years."). The citizenship question is a solution in search of a problem. For good reason, the district court concluded that there was "no evidence in the Administrative Record" that better citizenship data was needed to enforce the Voting Rights Act and, in fact, there was "plenty of evidence to the contrary." App. Cert. 295a.

Third, citizenship data—which is just one of many pieces of evidence currently used to prove a violation of the Voting Rights Act—is already available through the American Community Survey, and litigants and courts have been using this data to evaluate Voting Rights Act claims for decades. "Although [this] data may not be perfectly accurate, it is routinely relied upon in § 2 cases." *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1393 (E.D. Wash. 2014). Further, if the goal was to obtain additional data for courts and litigants to use to resolve voting rights controversies, Secretary Ross could have used administrative records to do so. Voting rights enforcement did not require jettisoning the Census Act's command that administrative records be used to the "maximum extent possible." 13 U.S.C. § 6(c).

Fourth, although the American Community Survey data is not perfect, the data that will result from the addition of this citizenship question will, as the district court found, almost certainly be even worse. Because "hundreds of thousands—if not millions—of people will go uncounted in the census if the citizenship question is included," App. Cert. 9a, it will produce inaccurate data, which will skew how courts evaluate voting rights claims. The result will be to hurt the very communities the Voting Rights Act was enacted to protect.

In sum, the citizenship question will produce a disproportionate undercount of minority communities, which will make it harder for them to claim the Voting Rights Act protections. Thus, rather than aiding enforcement of the Voting Rights Act, addition of the citizenship question will actually undermine the goal of enhanced voting rights enforcement. The Secretary's proffered justification thus provides no support for the addition of the citizenship question.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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April 1, 2019

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APPENDIX:
LIST OF *AMICI*

U.S. Senate

Schatz, Brian
Senator of Hawai'i

Bennet, Michael F.
Senator of Colorado

Blumenthal, Richard
Senator of Connecticut

Booker, Cory A.
Senator of New Jersey

Brown, Sherrod
Senator of Ohio

Cardin, Benjamin L.
Senator of Maryland

Coons, Christopher A.
Senator of Delaware

Dorgan, Byron
Former Senator of North Dakota

Duckworth, Tammy
Senator of Illinois

Durbin, Richard J.
Senator of Illinois

Feinstein, Dianne
Senator of California

LIST OF *AMICI* – cont'd

Gillibrand, Kirsten
Senator of New York

Harris, Kamala D.
Senator of California

Hart, Gary
Former Senator of Colorado

Hirono, Mazie K.
Senator of Hawai'i

Kaine, Tim
Senator of Virginia

Kerry, John
Former Senator of Massachusetts

Klobuchar, Amy
Senator of Minnesota

Levin, Carl
Former Senator of Michigan

Merkley, Jeffrey A.
Senator of Oregon

Reed, Jack
Senator of Rhode Island

Udall, Mark
Former Senator of Colorado

Udall, Tom
Senator of New Mexico

LIST OF *AMICI* – cont'd

Whitehouse, Sheldon
Senator of Rhode Island

Wirth, Timothy E.
Former Senator of Colorado

Wyden, Ron
Senator of Oregon

U.S. House of Representatives

Berman, Howard
Former Representative of California

Edwards, Mickey
Former Representative of Oklahoma

Morella, Constance
Former Representative of Maryland

Schneider, Claudine
Former Representative of Rhode Island

Smith, Peter
Former Representative of Vermont

Waxman, Henry A.
Former Representative of California